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No. 88-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK AND CARL R. KING,
Petitioners,
v.
E.F. HUTTON CREDIT CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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Not surprisingly, respondent in its Opposition makes almost no effort to defend the court of appeals' holding that there is a federal common law basis for denying petitioners a jury trial in this case.[1] Instead, it asserts incorrectly that there are technical reasons why the Court should avoid the Rules of Decision Act issue squarely presented by the holding of the Tenth Circuit. For the reasons we explain below, this case presents a proper vehicle for resolving the choice of law issue decided by the court of appeals and left open in this Court's decision

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[1] Respondent makes a feeble attempt to argue (Opp. 10-11) that the holding below, that federal common law controls, is consistent with certain of this Court's prior decisions. But respondent ignores the irony of relying upon this Court's Seventh Amendment holdings as support for the proposition that there can be a federal law basis for depriving a litigant in federal court of a jury trial.

last Term in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988).

1. Respondent initially asserts (Opp. 4-6) that it is not clear that there is a conflict between state and federal law on the issue of whether fraud in the inducement of a contract justifies rescission of a jury waiver provision in the contract. Respondent criticizes petitioners' failure to cite a case in either Utah or New York directly on this point. But respondent ignores the general state law rule recognized in both Utah and New York, which requires *all* terms of a contract to be set aside when there has been fraud in the inducement (see Pet. 3 and cases cited therein). Respondent has cited *no* case in any state court which has held that fraud in the inducement, which the jury specifically found to have occurred in this case, does not permit the injured party to rescind a jury waiver provision. Nor does respondent make any effort to explain why a state would not apply the general rule, which denies the defrauding party the benefit of his fraud, to this case. See Pet. 7. In sum, the state law rule is absolutely clear—petitioners were entitled to have the jury waiver provision declared unenforceable. The Tenth Circuit, however, avoided that conclusion by relying upon federal common law. Accordingly, the Rules of Decision Act question is squarely presented in this case.

2. Respondent asks the Court to deny certiorari on the ground that the choice of law issue was not properly preserved below. This is flatly wrong. As respondent concedes (Opp. 11), petitioners relied, in the court of appeals, upon both state and federal law in urging that court to uphold the district court's decision to submit this case to a jury, notwithstanding the contract provision. See Opp. App. 22a-23a (citing state law cases). For its part, respondent never suggested that the court of appeals should employ a federal common law rule in this case. Like petitioners, they submitted the case on the assumption that state law or the Seventh Amendment would control.

Based on the way the case was briefed by the parties, petitioners (and we suspect respondent as well) were completely surprised when the court of appeals held that there was a federal common law basis for holding in a diversity case that petitioners were not entitled to a jury trial. Petitioners then filed for rehearing arguing that under the reasoning of Justice Scalia's dissenting opinion in *Stewart Organization, Inc.*, there was absolutely no basis for choosing a federal rule of decision in this case.

Thus, contrary to respondent's assertion, petitioners unquestionably preserved the choice of law issue. They argued that state law supported their demand for a jury and they explained the error in employing a contrary federal rule at the only point where it became an issue, *viz.*, after the court of appeals mistakenly held that they were not entitled to a jury because of federal common law. Accordingly, the choice of law issue was properly preserved and squarely decided by the court below.

3. Respondent asserts (Opp. 8-9) that we mischaracterized the record in connection with the judge's decision to take evidence on the fraud issue prior to permitting the jury to hear that evidence. We are at a loss to understand respondent's point. It concedes that a hearing took place and the transcript citation for the hearing appears in its own Appendix at 23a. Moreover, it does not dispute that the court made a finding that there was prima facie evidence of fraud before any testimony of fraud was presented to the jury. Thus, the procedure followed did not permit petitioners to set aside a jury waiver provision solely on the basis of an allegation of fraud. It is for that reason that, contrary to respondent's assertion, petitioners have never had any reason to "concede that mere allegations of fraud are not sufficient to invalidate a jury waiver provision." Opp. 8. That is not what this case is about.

What this case is about is the holding of the court below that fraud in the inducement of the contract itself—

whether merely alleged or fully proved—can *never* be sufficient to justify voiding a jury waiver provision in a case brought in federal court under diversity jurisdiction. And what makes that holding remarkable is that the court reached this conclusion by relying solely upon federal common law. That specific holding warrants review by this Court.

4. Once the technical points raised by respondent are correctly discarded, the Opposition does not, and could not, seriously contend that the issue whether a federal common rule can be applied in this case is not an important question worthy of review by this Court. Respondent concedes that there are two apparently inconsistent legal standards under this Court's prior decisions (Opp. 7-8) and that the Court granted certiorari in *Stewart Organization, Inc.* last Term because of the conflict in the lower courts created by the conflicting legal standards (Opp. 9). Obviously, because the Court did not rule on the proper interpretation of the Rules of Decision Act in that case, the conflict in approach among the lower courts remains and the question still warrants the attention of this Court. The holding below could not more squarely present the choice of law issue that the Court granted certiorari to resolve last Term.[2] Nothing has happened during the interim to make the Rules of Deci-

[2] Respondent is plainly mistaken in arguing (Opp. 8) that the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" are not implicated by the holding in this case. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). If this lawsuit had been filed in state court, the trial court's decision to submit the case to a jury would not have been reversible error. But because the lawsuit was brought in federal court, the jury verdict has been set aside. Obviously, this disparity in result encourages forum shopping and reflects a manifestly inequitable administration of the laws. Moreover, by disregarding the state's interest in discouraging fraud, the holding of the court of appeals also does serious violence to the principles of federalism that are the bedrock of the *Erie* doctrine. *Id.* at 474 (Harlan J., concurring).

sion Act issue any less worthy of review now. Therefore, the Court should grant the petition in this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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